

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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UNITED STATES, et al., : Civil Action No.:
 : 1:23-cv-108
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Plaintiffs, :
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versus : Friday, March 24, 2023
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GOOGLE LLC, :
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 :
Defendant. :
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The above-entitled motions hearing was heard before
the Honorable John F. Anderson, United States District
Judge. This proceeding commenced at 11:02 a.m.

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 of the issues relating to the dispositive motions deadline
2 and briefing on that, and so my role is to talk to you a
3 little bit more about the discovery schedule that you all
4 have proposed and to give you the guidelines of what you
5 need to do in addressing the joint discovery plan that
6 you're supposed to have to me by Tuesday, I think, next
7 week, March 28th.

8 You know, before we get into that, if we could,
9 I'd like to go ahead and just get an outline from the
10 parties. And I'll have, Ms. Wood, you address it first
11 since obviously the United States has done more discovery
12 than Google has at this point.

13 But I just want to get a sense as to what has
14 actually been done already on the discovery phase. I mean,
15 my understanding, from reading the pleadings and things, is
16 that at least 2 million documents have been obtained from
17 Google, that -- I think I've learned last night that there
18 are 5 million documents that have been obtained from third
19 parties that are now available, and that 30-some depositions
20 have already been taken.

21 Is that generally accurate?

22 MS. WOOD: So, Your Honor, let me address that.

23 It is generally accurate that, in the combined
24 investigation, which once included matters not specific to
25 the ad tech industry that we're here on a complaint today,

1 that in the combined investigation over time, there have
2 been that volume of materials produced and depositions
3 taken.

4 However, Your Honor, at its inception, the
5 investigation was very broad, and there's been a substantial
6 funneling of the investigation over the course of its
7 development. It initially included, as I indicated,
8 materials, documents, depositions concerning the *Search* case
9 that is pending in the District of Columbia. And it also
10 included other markets that ultimately did not find their
11 way into the complaint the United States filed here.

12 So it is true that there have been a large amount
13 of documents produced, both from Google, as well as from
14 third parties, but it would be unfair to characterize those
15 documents as all relevant to this lawsuit that has been
16 brought. A meaningful portion of those documents relate to
17 things that are outside the scope of the complaint.

18 So there will be additional discovery. We do
19 benefit from the discovery that was taken, and we have every
20 intention to proceed expeditiously to fill in the gaps that
21 remain.

22 For example, from a temporal perspective, there
23 are -- approximately two years have passed since the last
24 meaningful document productions have taken place, from
25 either third parties or from Google, so there will be a

1 natural refreshing of document productions. There have been
2 additional custodians that have been added, people who have
3 left Google, new custodians who joined Google in certain key
4 positions that are relevant to the facts of the lawsuit.
5 And there are additional third-party materials that will be
6 needed.

7 But I, again, want to emphasize that we don't
8 intend to duplicate the efforts that have already occurred
9 during the investigation phase, and we will be as efficient
10 as possible in seeking third-party requests and seeking a
11 moderate amount of refreshing of data from Google as well.

12 THE COURT: What has been done as far as getting
13 that additional information in the New York action, if
14 you're aware of that? I mean, obviously you're following
15 the New York action, so I'm just ...

16 MS. WOOD: We are following the New York action.
17 I am not aware -- and my colleague will let me know. I'm
18 not aware whether documents have been produced. I learned
19 for the first time in the brief they filed last night that
20 they actually have received documents from third parties
21 there. We don't have access to those documents. I don't
22 know what's in those documents.

23 I think we will certainly work together to make
24 sure there's no duplication of efforts vis-a-vis the
25 Southern District of New York action. And to the extent

1 Google or other third parties have produced material there,
2 we will not seek those same materials through process in
3 this litigation.

4 THE COURT: Okay.

5 MS. WOOD: And, Your Honor, just to emphasize also
6 with respect to the 30 depositions, again, those
7 30 depositions, many of them did cover, or parts of the
8 deposition did cover the content at issue in this case, but
9 certainly many of those depositions were on other topics
10 that are not relevant to the allegations we've brought here.

11 So, again, I don't want to leave the misimpression
12 that we've taken 30, you know, seven-hour depositions that
13 all exclusively related to the facts of this case. That's
14 not an accurate presentation of what happened.

15 THE COURT: Mr. Mahr, let me hear what Google's
16 position is as far as what's been done, both in the
17 investigative stage and, more specifically, what's been done
18 in New York. I mean, you've been -- discovery has been open
19 in New York since sometime in January, I take it; is that
20 right?

21 MR. MAHR: Yes, Your Honor. January 27th.

22 And in terms of what's been done outside of
23 New York is quite easy. We've been giving a lot, and we've
24 got nothing. No depositions, nothing. Obviously in the
25 Department of Justice's investigation.

1 In New York, discovery was just, as I say, opened
2 on January 27th, I think.

3 THE COURT: That's almost two months, so that
4 isn't nothing.

5 MR. MAHR: Well, we've been waiting for documents,
6 and we've -- fewer than 10,000 have come in, and those have
7 come in from state agencies who are agencies of the states
8 that are plaintiffs in that case, so they're not real
9 relevant to this case. In terms of third-party discovery,
10 we've received nothing in the -- in that litigation yet.

11 THE COURT: Well, tell me what it is that you
12 think you're going to need to do in this case.

13 MR. MAHR: Well, there are two aspects to any
14 Section 2 monopolization case. One is the existence of a
15 monopoly, which, by itself, is not illegal under U.S. law.
16 And then there's anticompetitive conduct combined with that.
17 We are going to have to address both in this case.

18 I think one of the biggest issues will be the
19 existence of a monopoly or not. What is the market that we
20 are alleged to have monopolized. The Government has
21 presented three different markets compared to other cases
22 across the river in the *Search* case, which is just one
23 market. But three markets --

24 THE COURT: Well, the case -- the case in New York
25 involves three markets.

1 MR. MAHR: The same three alleged markets, yes.

2 THE COURT: Right. So you've been working on that
3 issue for a while.

4 MR. MAHR: We have. And -- but, by our count on
5 the demand side of that market, advertisers, there are at
6 least 20 other companies that do what Google does on the
7 demand side.

8 On the sell side, which is the advertise- -- the
9 publishers of the websites, there are five to ten major
10 competitors on that side. And then in the middle, the
11 exchange that actually mediates and matches the two, there
12 are over 30 of those kind of exchange and mediation
13 companies. That's just under the Government's market
14 definitions. That excludes what we think should be
15 included, companies like Amazon, TikTok, Facebook and others
16 who also provide a place for advertisers to seek a return on
17 their advertising dollars by reaching people through the
18 Internet in advertising.

19 All that is in the context of advertising in
20 general which, again, advertisers, we contend, seek the best
21 return on their investment. They don't care whether it's on
22 the Internet, on television, on radio or any other method,
23 and there are a lot of case law that talks about the
24 exchangeability. All those issues will have to be addressed
25 by experts in the fact -- in the data and the inputs to that

1 will have to come through fact discovery. We're not
2 proposing to depose every single one of those competitors,
3 but there are quite a lot out there.

4 When you go to the conduct side, there's also a
5 great deal. The defendant -- I mean the plaintiffs hardly
6 have a rifle shot complaint here. They have basically and
7 literally laid out the history of Google's ad tech business
8 going back 15 years to our first entry and said any major
9 event, any major new product, any major new service is
10 anticompetitive.

11 So we're faced with going back 15 years, and I
12 think ten separate, either product innovations,
13 optimizations, new services that the Government is
14 challenging. So that's also a great deal of conduct
15 evidence.

16 Again, we'll have a lot of that ourselves, but the
17 customers will also be probative in getting kind of
18 admissible evidence as to what the effect of those
19 optimizations and features were on customers.

20 THE COURT: So Google made some strong arguments
21 that the arguments in this case are very similar to the
22 arguments in New York. And I'm a little confused because
23 I'm looking at things that are going on in New York, and if
24 I understand it right, there's a substantial completion of
25 document production in New York that is to be done by May;

1 is that right?

2 MR. MAHR: By the parties, yes, Your Honor.

3 THE COURT: Okay. How different do you think that
4 the documents and information you're going to be getting in
5 New York is going to be from the plaintiffs in this case? I
6 mean, the issues are all the same --

7 MR. MAHR: I think --

8 THE COURT: -- according to what you say, and, you
9 know, there are going to be some variations of what the
10 arguments are, some emphasis here or there. But, you know,
11 if the markets are the same -- obviously you have competent
12 counsel dealing with the issues on behalf of the plaintiffs
13 in New York -- why is it that, you know, substantial
14 completion of the document production in New York isn't
15 going to give you most of what you're going to get in this
16 case?

17 MR. MAHR: Well, the substantial document
18 completion is not for the third parties, and that's where
19 we're left behind. We will do the refresh that Ms. Wood
20 just referred to by that substantial completion date. We'll
21 get substantial completion from a number of states who
22 aren't in this case. But as far as our third-party
23 competitors, which are really what goes to the market
24 definition, none of that is related to the substantial
25 completion date.

1 That's where we're faced with third-party
2 discovery in New York that goes over a 17-month period, and
3 we're proposing here to do it in less than half that. That
4 will take some triaging for us in certainly identifying the
5 most important third-party witnesses and getting after them
6 in this case, hopefully also to use it in that other case.

7 THE COURT: Well, in the two months that you've
8 had to do discovery in New York, how many third-party
9 subpoenas have you issued relating to the issues that are
10 the same here and in New York?

11 MR. MAHR: I don't have that number, Your Honor.

12 THE COURT: I mean, have you done any?

13 MR. MAHR: I think -- I think discovery has begun
14 with the focus on the parties that were being -- we're
15 facing, including all the private parties. I don't know
16 that third-party discovery has gone out yet, Your Honor.

17 THE COURT: Well --

18 MR. MAHR: It's not far.

19 THE COURT: Okay. Well, you don't have the
20 benefit of having two months of not doing anything in our
21 court.

22 MR. MAHR: Well understood, Your Honor.

23 THE COURT: Your discovery is going to be opening
24 up on Monday, and you need to be very active in doing what
25 you say you need to do starting Monday.

1 MR. MAHR: And we are preparing those -- we are
2 preparing those third-party subpoenas. To the extent they
3 need to be tailored to individual defendants, we're doing
4 that. And we're doing the triage, because we recognize
5 where we could go to talk to 60 or 70 in New York; we're not
6 going to have that many here, and we understand that.

7 THE COURT: Okay. And what I'm planning to do --
8 and go ahead and have a seat, and I think -- unless there's
9 anything else that you want to add on the overall current
10 posture of discovery.

11 MS. WOOD: No, Your Honor. Other than we stand
12 ready, and literally people are back at our office now
13 finalizing subpoenas to serve on Monday. So we absolutely
14 intend to move with great dispatch, Your Honor.

15 THE COURT: Well, interrogatories and document
16 requests and other things as well, I hope.

17 MS. WOOD: Yes, Your Honor.

18 THE COURT: Okay. You know, there are a lot of
19 moving parts in this case, and I understand that, and so I
20 want to take it a step at a time and talk about what we're
21 going to do today and what we're going to do maybe next week
22 if we're in a position to do it.

23 I'm going to tell you the dates that I have
24 negotiated with Judge Brinkema. And, I will tell you, it
25 was a bit of a negotiation about the dates that we're

1 willing to set out today to give you the framework for what
2 you need to do in order to prepare your joint discovery plan
3 that we will get on Tuesday.

4 I want to talk to you about when we can get
5 together again and talk more about the particulars of that,
6 and if you can have an agreed plan, we can just talk about
7 general case things. If you don't have an agreed plan, then
8 we'll talk about how we're going to get those issues
9 resolved. So I don't know how far along you all are on
10 that. I do want to make sure that we have a fairly short
11 timetable for if we don't have an agreed plan, for you to
12 come back in and we -- you have a plan, whether it's agreed
13 to or not.

14 I mean, there are a lot of things that go into
15 that. You know, getting the protective order entered in
16 this case is going to be significant. I assume there's a
17 protective order that's already entered in New York. I
18 don't know whether the United States has had an opportunity
19 to review it, to modify it or to be in a position to present
20 a stipulated protective order or not.

21 MS. WOOD: Your Honor, the parties have been
22 working very cooperatively on that front. We have both a
23 proposed protective order that we've been exchanging and
24 marking up, a proposed ESI order, a proposed stipulation
25 regarding expert discoverability, as well as obviously the

1 discovery plan that we'll submit to Your Honor on Tuesday.
2 So we have been working in preparation for this conference
3 to -- and even before to do all of those things, Your Honor.

4 THE COURT: Well, working and producing are two
5 different things. And, you know, my understanding was it
6 took an awfully long time to get the ESI plan together in
7 New York. You don't want me making those decisions, but if
8 we have to, I'll make those decisions. So, you know, we're
9 not going to wait a long time because the parties have got
10 to get moving along quickly in this matter.

11 So let me go ahead and tell you what the dates are
12 going to be. In discussing these dates with Judge Brinkema,
13 she instructed me to tell you that these are not going to be
14 modified. I will tell you that the end date will not be
15 modified. The dates in between now and the end date I have
16 some authority to give you more time here or there, but, you
17 know, the date in which everything is going to need to be
18 done needs to be done.

19 These will be in an order that I get out later
20 today, so you don't necessarily have to worry too much about
21 it. And it's kind of comparing the dates that you will be
22 under as compared to what you proposed in your plan.

23 Obviously, fact discovery, we'll have that start
24 on March 27th, as you have indicated in your plan. I do
25 want you to submit your proposed plan, joint discovery plan

1 with me on March 28th. We'll keep the initial disclosure
2 dates of April 3rd there. And now we start talking about
3 the modified dates. We're going to move up the substantial
4 completion of document production date approximately a
5 month. So that's now going to be July 7th.

6 You know, part of this is that, you know,
7 hopefully the parties will work together to allow whatever
8 has been done in New York here. I think the investigation
9 file is going to be produced fairly promptly. Those kinds
10 of things. And I -- you know, this is a schedule that is
11 substantially longer than what we normally would do, in view
12 of all scheme of things. And I am agreeing with you all and
13 have gotten the blessing to allow fact discovery and then
14 expert discovery in this case, which is not something that
15 is typical in our court.

16 So we're going to talk about the fact discovery
17 first and then the expert discovery. But you need to do
18 your substantial completion of your document production by
19 July 7. Fact discovery is going to need to end by
20 September 8th. One of the -- and that's -- you know, we're
21 shortening that period between substantial completion and
22 fact discovery ends by a month. It sort of moves things up
23 by about two months there.

24 The time period between when fact discovery ends
25 and the expert reports are due was substantially too long, I

1 think, in our view. I mean, the experts, certainly, I
2 think -- Google has had experts working on this issue for
3 years now. I mean, I would imagine, given the issues that
4 were presented in the New York case, that process has been
5 underway. I think the United States has probably, in its
6 investigation, been using experts to help them guide that
7 investigation. The experts don't have to wait until the end
8 of discovery to start their work in preparing their reports
9 and doing their analysis.

10 So we're going to have the initial expert reports
11 due on October 13. Any opposing reports will be due on
12 November 17. Rebuttal reports will be due on December 6th.
13 And expert discovery will end on January 12th, and you will
14 have a conference with Judge Brinkema on January 18th.

15 In most cases, we would call that a final pretrial
16 conference in which you would be, you know, submitting your
17 list of exhibits and list of witnesses and getting your
18 trial date. I think as this case progresses, that date will
19 probably be more of a scheduling conference with
20 Judge Brinkema than a final pretrial conference.

21 So I don't want you to get too anxious about I'm
22 going to have to have my list of witnesses done within
23 six days after all of the expert discovery ends. I think,
24 at that point, you will probably be meeting with
25 Judge Brinkema, talking about the schedule for filing

1 motions for summary judgment, motions in limine, other kinds
2 of motions that you'll want to do, the briefing schedule for
3 that, and then when she may go ahead and set the trial date,
4 but obviously probably will be doing a list of witnesses and
5 exhibits at a later time than then.

6 I know this is an aggressive time for you. You
7 know, I think you need to make good use of the time that you
8 have, focus your attention on certain things. You know,
9 you're not going to be able to turn over every grain of
10 sand. These are important issues, they're big issues, but
11 they're issues that the parties have been contemplating and
12 dealing with in various places for extended periods of time.
13 And this is -- you know, at some point if you can't get them
14 resolved, they need to be resolved, and Judge Brinkema's
15 ready and willing to do the task if need be in this case.

16 So the January 18 date is the date that I tell you
17 I have no authority to change. If you need weeks difference
18 between, you know, this date and another date in between the
19 substantial completion or even that date, I think I could
20 modify a week or two. But this is -- discovery is going to
21 have to end -- expert discovery is going to have to end by
22 January 12th, and you'll have to be in a position to meet
23 with Judge Brinkema on the 18th and talk about summary
24 judgment, motions in limine, *Daubert* motion issues and those
25 kinds of things by then.

1 So, in the normal course what I would be doing
2 would be, you know, waiting to have a joint discovery plan
3 and then have an initial conference with the parties. I
4 think given -- having to give you that timetable of what
5 we're working under, we're having a session now, but I also
6 want to be able to have a session with you all and talk to
7 you more about, you know, briefing and motions and our
8 motions practice.

9 I think everybody here knows that, you know, the
10 magistrate judges -- I will be hearing motions on Fridays,
11 and how we can do expedited hearings and certain things
12 where you can file it on Friday and have it decided the
13 following Friday, and motions that are -- one can consider
14 that being reasonable. And I will just say I've been
15 involved in some significant cases involving issues that
16 probably shouldn't be resolved on a one-week schedule, and
17 the parties have to have some discretion in using the
18 expedited briefing schedule.

19 Part of that is, you know, under that schedule,
20 you file a motion on Friday, the opposition is due on
21 Wednesday, and the reply has to come in on Thursday. So if
22 you're the moving party, you've got to be -- take advantage
23 of that expedited briefing schedule. You know, all hands
24 have to be on deck for getting something to me on Thursday
25 so that I can have an opportunity to read it. And filing it

1 Friday morning isn't going to work. My goal -- I don't
2 always accomplish this, but my goal is, you know, when you
3 walk out of here on Friday, you know what the ruling is, and
4 that's the way we keep things moving along.

5 So on the discovery end, if issues come up, you
6 know, you have to have a good faith consultation, it has to
7 be a real good faith consultation, not I called them at 4
8 and I filed it at 5 and never heard back from them. That
9 really isn't a good faith consultation. And if we start
10 having a number of issues, I've used some tactics in some
11 cases that, you know, I designate certain people that need
12 to be involved in any discussions to make sure that there's
13 no waiting around, or I couldn't get ahold of this person or
14 that. But I hope I don't have to take those, what I would
15 consider fairly unusual steps in this case.

16 I would suggest that, you know, we either get
17 together next Friday or at some point the following week. I
18 mean, I want to have enough time to see what it is. And if
19 you all have a stipulated protective order, you just file it
20 and I'll enter it. So I'm not going to wait to have a
21 hearing or anything that you've agreed to or an ESI order or
22 anything like that.

23 But I could meet with you either Friday morning of
24 next week. I could meet with you -- if you wanted to do
25 something on a more, I would say special time, I could

1 probably do it Thursday afternoon of next week or sometime
2 during the week following that. That will kind of open it
3 up to you all's availability.

4 And I will say, my plan is to have hearings in
5 person, you know, on any kind of motions, certainly anything
6 that is of a substantive nature. You know, a while back we
7 were doing a lot of Zoom hearings and those kinds of things,
8 but I think given the nature of this case, the parties need
9 to plan on hearings that we have being here in open court.

10 I know I'm kind of hitting you out of the blue
11 with scheduling, and many people don't understand that you
12 can have paper calendars with your schedule, and most people
13 say, well, it's all on my phone, I don't know. I -- well,
14 what I'm going to do is I'm going to ask you to let me know
15 before the end of the day today whether you would be
16 available next Friday at 10:00 for a follow-up. And, if
17 not, then what blocks of time you would be available the
18 following week, afternoon or morning time periods, and then
19 I'll pick a time, and then we'll just get together. But I
20 don't want to force something on the parties that would
21 require you all to rearrange a lot of different schedules.

22 Ms. Wood.

23 MS. WOOD: Yes, Your Honor. Thank you, Your
24 Honor.

25 I am available next Friday. I have -- parts of my

1 schedule are put to memory, so I am available next Friday.
2 However, the following week, I am supposed to be with my
3 family on spring break. I could certainly do anything
4 telephonically.

5 THE COURT: The last vacation you get --

6 MS. WOOD: I think that's probably right.

7 THE COURT: -- until, you know, probably early --
8 mid January or maybe even later than that. But enjoy your
9 time.

10 MS. WOOD: I think that's right. I'll say goodbye
11 to my kids for a while.

12 THE COURT: Mr. Mahr.

13 MR. MAHR: Your Honor, we'll be available on
14 Friday at 10.

15 THE COURT: You will be available on Friday?

16 MR. MAHR: To make that work, yes.

17 THE COURT: Okay. Well, why don't we go ahead --
18 I'll put in an order that we issue today that I plan to meet
19 with the parties on Friday, March 31st at 10 a.m. Currently
20 I don't -- I only have one other matter currently scheduled
21 for next Friday, but I won't know for sure until 5:00 today
22 as to what gets filed today and noticed for next Friday.
23 But, you know, if, for one reason or another, it seems -- I
24 may set it for 11:00.

25 As you can tell, we have a court reporter here,

1 which is a little bit unusual for the magistrate judges, and
2 I think we'll probably try and make arrangements to have a
3 court reporter in any time that we have a session here in
4 this case. So instead of 10, I may make it 11 to kind of
5 coordinate with Judge Brinkema's chambers on that.

6 So it will be next Friday at either 10 or 11:00.
7 Okay. So get me your plan on Tuesday, and we'll see each
8 other again a week from today.

9 Any questions or other issues that you want to
10 discuss while we're together?

11 MS. WOOD: No. Thank you, Your Honor.

12 THE COURT: Mr. Mahr, anything else?

13 MR. MAHR: No, Your Honor. Thank you.

14 THE COURT: Thank you. All right. Court will be
15 adjourned. Thank you.

16 (Proceedings adjourned at 11:31 a.m.)

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18 I certify that the foregoing is a true and accurate
19 transcription of my stenographic notes.

20 Stephanie Austin

21 Stephanie M. Austin, RPR, CRR
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23
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25